IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.620/2006

Reserved on: 22.10.2007

Decided on.29.10.2007

Rajinder. M. **…Petitioner.**

Versus

Union of India and others. **Respondents**

Coram

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting ?[1]. No.

For the petitioner : Mr. Deepak Kaushal, Advocate.

For the respondents Mr. Ravinder Thakur, Central Government Counsel.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of the present petition are that the petitioner was enrolled in the Army as a Direct Entry Junior Commission Officer on 23rd March, 1989 for a period of five years under the provisions of Government of India, Ministry of Defence letter No. 76878/EIA/1155-S/D(Works-II) dated 19th October, 1963. He was discharged on 11th December, 1993. The posting orders were issued from Garrison Engineer Chandigarh to Director General Naval Project, Vizag vide Record Office BEG Roorkee letter No. A9/4903/Vol-83/04/(R) (MES) dated 30th April 1993. Movement orders were passed on 15th February, 1994 by the authorities. The discharge order passed in favour of the petitioner was cancelled vide Records BEG Roorkee letter No.A3/5225/09/Vol-I/R dated 16th February, 1994 consequent to approval of Army Headquarters for grant of regular Junior Commission. The

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? No.

petitioner remained absent with effect from 23rd February, 1994 onwards. He was apprehended on 5th August, 1995. He filed a criminal writ petition No.39/1995 before this Court and pursuant to order dated 21st September, 1995, he was set free by the Army authorities. He reported to DGNP (V) physically on 22nd November, 1996. The disciplinary proceedings were initiated against him, however, he remained absent from 1st May, 1998 onward. The petitioner filed writ petition bearing No. 244/99 in this Court assailing the cancellation of discharge order dated 11th December, 1993. The writ petition was allowed by this Court on 11th March, 2004 and the order dated 16th February, 1994 was quashed and set aside, but the respondents were directed to cancel the discharge order dated 11th December, 1993 in accordance with law after giving reasonable opportunity to show cause against the proposed action. The LPA No.33/2004 was preferred against the decision dated 11th March, 2004 but the same was dismissed by a Division Bench of this Court on 3.8.2004.

It appears from the reply filed by the respondents that the during pendency of the writ petition i.e. CWP 244 of 1999, the petitioner was dismissed from service with effect from 1st May, 2001 purportedly under section 20 of the Army Act, 1950 read with Rule 17 of the Army Rules, 1954. After the dismissal of the LPA No.33/2004 by this Court on 3.8.2004, the case was referred to Army Headquarters to obtain sanction of the Government of India to amend the order vide BEG Record Office letter No.2017/613/AI dated 1st September, 2004. The Army Headquarters vide letter No.39382/BEN/RM/226/CC/EIA dated 22nd February, 2005 accorded sanction to the effect that petitioner will be deemed to have discharged from service on 22nd March, 1994. The text of letter dated 22nd February, 2005 being relevant is reproduced below, which reads thus:

"I am directed to convey the sanction of the competent authority to implement the above cited Court Order in respect of No. JC-199873 A Nb Sub/E&M II Rajendra M of BEG,Roorkee. The individual will be deemed to have been discharged from service on 22 Mar 94 as per his original contractual period of engagement without prejudice to the pending disciplinary proceeding. He will not be entitled for pay and allowances or any other benefit arising out of his service performed after 22 Mar. 94.

This issues in consultation with Min. of Def (Finance) vide their U.O No.174/PD/05 dated 21 Feb. 2005."

Consequently as per the reply filed by the respondents the dismissal order was converted to discharge SSO with effect from 22nd March, 1994 which was issued on 15th March, 2005.

The petitioner made a representation to the competent authority on 10th September, 2004 as well as on 15th January, 2005 for the implementation of the orders passed by this Court. The last representation was made by the petitioner on 2nd July, 2005.

Mr. Deepak Kaushal, Advocate had strenuously argued that the final decision to discharge the petitioner has been taken on 22nd February, 2005 and thus he is entitled to all the consequential benefits i.e. salary etc. with effect from 1994 onwards.

Mr. Ravinder Thakur, Advocate had supported the decision of the respondents whereby the petitioner was not held entitled to any benefits after 22nd March, 1994.

I have heard the learned counsel for the parties and perused the record.

The position which emerges from the aforesaid facts is that the petitioner was engaged as Junior Commission Officer with effect from 23rd March, 1989. The petitioner was discharged on 11th December, 1993. The same was revoked without issuing any show cause notice on 16th

February, 1994. The petitioner was granted regular commission and he was posted at Director General Naval Project, Vizag and movement orders were issued on 15th February, 1994. He was apprehended by the authorities on 5th August, 1995 and was released after the orders passed by the Court in criminal writ petition No. 39 of 1995 on 21.9.1995. He physically reported for his duties on 22nd November, 1996. He remained in service up to 1st May, 1998. He was dismissed on 1st May, 2001 during the pendency of the writ petition being CWP No. 244/99 which was decided on 11.3.2004. This fact was not brought to the notice of the Hon'ble Single Judge. This fact was also not brought to the notice of the Division Bench hearing LPA No. 33/2004 which was decided on 3rd August, 2004. It was only after the dismissal of the LPA that the sanction was obtained by the authorities from the Army Headquarters which led to the issuance of orders dated 22nd February, 2005 as well as order dated 23rd February, 2005. It has come in the reply that after the issuance of order dated 22nd February, 2005, the order of dismissal was converted into discharge meaning thereby that the petitioner had been treated to be in employment up to 22nd February, 2005.

A strange averment has been made in sub para (c) of para 7, 8 and 9 of the reply as if this Court had directed that the petitioner will not be entitled for pay and allowances or any other benefits arising out of this service performed after 22nd March, 1994. There is no such order passed by this Court while deciding the CWP No. 244/99 or LPA No. 33/2004 on 3rd August, 2004. This averment as contained in the reply factually is incorrect. The petitioner after the cancellation of his discharge order dated 11th December, 1993 was directed to join his duty at Director General Naval Project, Vizag. He was also apprehended on 5th August, 1995 as observed above. He physically presented himself for duties on 22nd

November, 1996. According to the respondents, the petitioner again absented himself with effect from 1st August, 1998 and he was declared deserter and consequently dismissed on 1st May, 2001. The respondents have not placed the copy of order whereby the petitioner was dismissed on 1st May, 2001. It was incumbent upon the respondents either to place on record the copy of order dated 1st May, 2001 or the entire record to convince this Court that the dismissal order dated 1.5.2005 was in conformity with sub-section (3) of section 20 of the Army Act and Rule 17 of the Army Rule, 1954. As a matter of fact the order of dismissal was converted to order of discharge vide order dated 22nd February 2005. It is thus evident that there was a master-servant relationship which always existed between the petitioner and respondents. The master-servant relationship had come to an end only after the passing of the order dated 22nd February, 2005. The order dated 22nd February, 2005 could not be applied retrospectively and the petitioner could not be deemed to have been discharged from service on 22nd March, 1994 as per the order dated 22nd February, 2005 that too without pay and allowances or any other benefits after 22nd March, 1994. The order dated 22nd February, 2005 was to take effect prospectively and the discharge of the petitioner was to take place only after the issuance of order 22nd February, 2005 and not from the deemed date i.e. 22nd March, 1994. Releasing the petitioner with effect from 22nd March, 1994 was the arbitrary exercise of the powers vested in the authorities causing prejudice to the petitioner.

Consequently the writ petition is allowed. Annexure R-IV dated 22nd February, 2005, Annexure R-X dated 23rd February, 2005 are quashed and set aside with the direction that the discharge of the petitioner will take effect from 22nd February, 2005 and he will be entitled to all the consequential benefits i.e. arrears of salary etc. with effect from

22nd March, 1994 onwards. The respondents are directed to calculate the arrears of salary etc. within a period of 8 weeks. There shall be no order as to costs.

(Rajiv Sharma), Judge

October 29, 2007
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